NOUVAU MONT DOR (M) SDN. BHD. v. FABER DEVELOPMENT SDN. BHD.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) March 6 & May 26, 1984]

[Johore Bahru – Federal Court Civil Appeal No. 177 of 1983]

Practice and Procedure – Assignment – Absolute assignment not by way of charge only – Whether assignor entitled to sue in his own name – Civil Law Act, 1956, s.4(3).

In this case the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johore Bahru for the sum of $184,320.00. Subsequently the appellant entered into an agreement with the Public Bank, which agreed to give the appellant a fixed loan of $92,160.00. The appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interest in the property pending the issue of the strata title to the bank. Subsequently the respondent purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings. The appellant appealed.

Held: (1) whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act, 1956 is to be gathered only from the four corners of the instrument itself;

(2) the document in this case was an absolute assignment not purporting to be a charge only within the meaning of section 4(3) of the Civil Law Act and therefore the appellant was not competent to maintain the action when it was filed.

Cases referred to:

(1) *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765, 769, 770.
(2) *Read* v. *Brown* (1889) 22 Q.B.D. 128.
(3) *Hughes* v. *Pump House Hotel Co. Ltd.* [1902] 2 K.B. 190.
(4) *Walter & Sullivan Ltd.* v. *J. Murphy & Sons Ltd.* [1955] 2 W.L.R. 919.
(5) *Comfort* v. *Betts* [1891] 1 Q.B. 737.
(6) *Mercantile Bank of London* v. *Evans* [1899] 2 Q.B. 613.

FEDERAL COURT.

A. Lee for the appellant.

U. Masacorale for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): The only question to be decided in this appeal involves the interpretation of an assignment made on February 18, 1978 between the appellant, as assignor of the one part and the Public Bank, as assignee of the other part.

The relevant facts do not appear to be in dispute and may be briefly stated. On April 1, 1977 the appellant, as purchaser entered into a sale agreement with the developer, Tan Kim Chua Realty (M) Sdn. Bhd. whereby the latter sold one shop/office unit described as Lot 222 in a multi-storey shopping and office complex now known as Merlin Tower to be erected on land held under Grant 5531 Lot 730 in the township of Johor Bahru to the appellant for the sum of $184,320.00 (hereinafter referred to as the said property). Subsequently an arrangement was arrived at whereby the Public Bank would grant to the appellant a fixed loan of $92,160.00 to enable the appellant to pay to the developer the balance of the purchase price. This arrangement was carried through by means of two documents dated February 18, 1978. The first was a loan document and the second was an assignment, which is the subject of the appeal. Not only the developer had express notice it had in fact expressly consented to the assignment.

It is not disputed that in 1980 the respondent, Faber Development Sdn. Bhd. purportedly purchased from the developer the whole shopping/office complex (Merlin Tower) including the car park and hotel floors but excluding the shop/office units already sold by the developer.

On November 17, 1982 the appellant commenced proceedings in the High Court at Muar seeking from the respondent certain declaratory relief. After the filing of the originating summons the assignment was revoked on April 21, 1983 following the repayment and settlement of the fixed loan by the appellant to the Public Bank. At the hearing of the originating summons preliminary objection was taken by the respondent that at the time of the filing of the originating summons and having regard to the terms of the assignment of February 18, 1978 the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings with costs. Hence this appeal.

As is well known, an ordinary debt or chose in action before the Judicature Act 1873 was not

assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was *a fortiori* the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. Now it was in order to afford some remedy for this state of the law that subsection 6 of section 25 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or chose in action [Chitty L.J. in *Durham Brothers* v. *Robertson*[1] at pages 769 and 770].

The law on assignment is governed by section 4(3) of the Civil Law Act 1956 and it reads as follows:

"Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

The wordings of this subsection are in the same terms with section 25(6) of the Judicature Act 1873 which had since been replaced by section 136 of the Law of Real Property Act 1925.

It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of section 4(3) of the Civil Law Act 1956, then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor [*Read* v. *Brown*[2]; *Hughes* v. *Pump House Hotel Co. Ltd.*[3] and *Walter & Sullivan Ltd.* v. *J. Murphy & Sons Ltd.*[4]].

Reference will be made to certain English cases in an attempt to see how the courts there have been dealing with the same problem which we are called upon to solve. In considering English authorities, however, we must bear in mind the provision of section 6 of the Civil Law Act 1956 which provides that "Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein". We would first of all refer to two cases, viz. *Comfort* v. *Betts*[5] and *Hughes* v. *Pump House Hotel Co. (supra)* where the courts came to the conclusion that the documents amounted to an absolute assignment, not purporting to be by way of charge only. In the former case it was held that an assignment of a debt or legal chose in action may be absolute within the Judicature Act section 25(6) although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignee. In the latter case, the plaintiff on March 7, 1901 signed and gave to Lloyd's Bank, the following instrument:

"In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company Limited, of Llandrindod Wells, under or by virtue of a certain contract dated November 1, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandridod Wells) and all other moneys, if any, due, or to become due, to me from the said company, including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expense of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created."

It was held that the above-mentioned instrument having the effect of passing the whole right and interest of the assignor in the moneys payable

under the building contract to the assignees by way of security, it was an absolute assignment (not purporting to be by way of charge only) within the meaning of section 25(6) of the Judicature Act 1873.

The other two authorities we would like to refer to are *Mercantile Bank of London* v. *Evans*[6] and *Durham Brothers* v. *Robertson (supra)* where a contrary conclusion was reached by the courts. In the *Mercantile Bank case* the plaintiffs made an advance to a customer who executed the following assignment:

"In consideration of your placing to my credit to-day the sum of £200, I hereby assign to you the whole of my rights and interest under the agreement dated June 1, 1897 ... as security for the repayment on demand of the said sum of £200 and any further sum or sums that you may from time to time hereafter advance to me either directly or by way of overdraft or otherwise howsoever, and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder, either in my name or your own; and I hereby appoint you my irrevocable attorneys in the behalf."

It was held that the assignment was not an absolute assignment within the meaning of section 25(6) of the Judicature Act 1873.

In the latter case a firm of building contractors delivered to the plaintiffs a document in the following terms:

"Re Building Contract, South Lambeth Road – In consideration of money advanced from time to time we hereby charge the sum of £1080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you."

It was held that the document was not "an absolute assignment" (nor purporting to be by way of charge only) within section 25(6) of the Judicature Act 1873 and that the plaintiffs could not recover in the action.

Commenting on the *Mercantile Bank* case in *Hughes* case, Mathew L.J. said at page 195:

"... general terms were used in making the assignment, but, when the whole instrument was looked at, it appeared that what was intended was only to assign so much of the debt or chose in action as would provide security for a debt of £200 ... Upon that becoming apparent it was held that the true character of the interest given was that of a charge only ..."

It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee [Mathew L.J. in *Hughes* v. *Pump House Hotel Co. Ltd. (supra)*]. Having stated the preliminary and before we examine the terms of the document of assignment dated February 18, 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

Now, the assignment of February 18, 1978 appears to be in the form of a legal document signed by all the parties concerned, viz. assignor (appellant), assignee (Public Bank) and the predecessor-in-title of the respondent. After reciting that (a) the appellant had entered into a sale agreement with the respondent's predecessor-in-title for the purchase of one unit of shop/office lot in the Merlin Tower, (b) that the Public Bank would give a loan to the appellant to enable him to pay off the balance of the purchase price, (c) that when the "strata title" of the said property was issued and registered in the name of the appellant he would execute and register a first legal charge of the said property in favour of the Public Bank and (d) pending the issue of the "strata title" the appellant would assign to the Public Bank all his rights title and interest in the said property and the appellant duly executed the assignment in the following terms:

"That in consideration of the Bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the Bank all his rights title and interest in and to the said property and under the said Sale Agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same."
(See clause 1)

Clause 2 provides, *inter alia,* that the assignor shall at all times hereinafter save harmless and keep the Bank indemnified. The assignor shall be solely liable for the cost of preparing the document of assignment (see clause 3), and the assignment shall be binding upon the executors, administrators or assigns of the parties (see clause 4). In clause 5 it reads:

"This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of a first legal charge over the said land in favour of the Bank."

Looking at the whole document of February 18, 1978 and bearing in mind the provision of section 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in clause 1 thereof [see Fry L.J. in *Comfort* v. *Betts (supra)* at page 740]. If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment [*Hughes* v. *Pump House Hotel Co. (supra)* and *Comfort* v. *Betts (supra)*]. We therefore agree with the judgment of the learned Judicial Commissioner but for different reason, that the appellant was not competent to maintain this action at the time when the originating summons was filed on November 17, 1982. The appeal is dismissed with costs to the respondent. The deposit of $500.00 to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *A. Lee & Co., Jackson & Masacorale.*
corale.

CHAN KIT HONG & ANOR. v. JAYAKUMAR & ANOR.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) February 20 & May 26, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 231 of 1983]

Tort – Negligence – Claim for contribution – Need to file counterclaim – Civil Law Act, 1956, s.10.

Practice and Procedure – Action for damages for negligence – Notice of indemnity and contribution against plaintiff – Defendant should file counterclaim – R.H.C., 1980, O.15 r.2 & O.16 r.8.

In this case the first and second respondents had sued the appellants for negligence arising out of a collision between a motor car driven by the first respondent in which the second respondent was a passenger and a motor lorry driven by the first appellant. Solicitors for the appellants duly filed a notice of indemnity and contribution against the first respondent claiming to be entitled to contribution from any sum which the second respondent might recover from the appellants to the extent of the first respondent's liability. When the case come on for trial, the parties by consent agreed on liability as between the first respondent and the appellants, the former was 20% to blame. As for the second respondent, the appellants admitted a 100% liability and they were in due course ordered to pay the sum of $230,871.92 general and special damages with interest and cost. Counsel for the appellants then contended that they were liable to pay the second respondent only 80% of the total award and that the balance of 20% should be recovered by the second respondent direct from the first respondent. The learned Judge ruled against the appellants and they appealed.

Held: in this case the claim against the first respondent should have been made by counterclaim and therefore the appeal should be dismissed.

Cases referred to:

(1) *Croston* v. *Vaughan* [1938] 1 K.B. 540.
(2) *Lampert & Anor.* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 All E.R. 719.
(3) *Oli Mohamed* v. *Keith Murphy & Anor.* [1969] 2 M.L.J. 244.
(4) *Mallett & Anor.* v. *Dunn* [1949] 1 All E.R. 973.
(5) *Drinkwater & Anor.* v. *Kimber* [1952] 2 Q.B. 281.

FEDERAL COURT.

Jagjit Singh for the appellants.
Sri Ram for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The first and second respondents had sued the appellants for negligence arising out of a collision between motor car BAF 996 driven by the first respondent in which the second respondent was a passenger, and motor lorry BAX 1378 driven by the first appellant.